# Supreme Court of the United States.

OCTOBER TERM, 1902.

| | |
|---|---|
| THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. SAMUEL E. WATSON. | No. 223. |

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## BRIEF FOR PLAINTIFF IN ERROR.

### Statement.

This case was originally brought in the District Court of Texas for the County of Red River on the twenty-fourth day of April, eighteen hundred and ninety-six, and was removed into the Circuit Court of the United States for the Eastern District of Texas on the ground that a federal question was involved by reason of the incorporation of the defendant under the laws of the United States.

Plaintiff in his amended original petition, in which the Phœnix Insurance Company of Brooklyn joined as

plaintiff (Tr., p. 6), claimed damages for the loss of sixty-four bales of cotton by fire while stored and located upon a platform near the line of the railway company in the Town of Clarksville ; alleged negligence of the railway company in the construction, equipment and operation of its train of cars ; and also that the said fire originated from sparks, cinders and fire emitted from a certain engine of defendant while passing the platform. They also alleged that the defendant, its agents and employees were grossly careless and negligent in the manner of operating the train, running it at a high and dangerous rate of speed and failing to exercise ordinary care in such operation.

It was also stated that the insurance company had paid to Watson $1,077.37 in full settlement of his claim upon its policy of insurance and that it had received from him an assignment of his claim against the railway company. Defendant subsequently made settlement with the insurance company for its part of Watson's claim (Tr., p. 24).

Defendant (Tr.,pp. 14, 15) demurred to the petition generally and specially (as to the effect of the assignment to the insurance company) ; pleaded the general issue ; and for special answer alleged that plaintiff's damages, if any, were caused and contributed to by his own negligence and want of care and resulted from a risk assumed by him ; denied any negligence on its part, alleging that its engines were properly equipped with the best appliances for arresting the escaped sparks of fire, and that they were properly manned and operated and in good condition. It also claimed that the destruction of the cotton was due to want of care on the part of its owner, his agents and servants, in that they placed said cotton knowingly in close proximity to the track. Defendant

further alleged that the platform was operated by one O'Neill under certain leases by the terms of which defendant was released from all liability for loss or damage by fire whether occasioned by sparks from locomotives or otherwise.

Plaintiff filed exceptions to the answer.

Defendant's demurrer and special exceptions were overruled (Tr., p. 19).

There was a verdict for plaintiff for $2,017.37 for which sum judgment was entered. The United States Court of Appeals for the Fifth Circuit reviewed the judgment on writ of error and gave judgment of affirmance from which a writ of error has been sued out to this court.

## Assignments of Error.

I.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court of the Eastern District of Texas.

II.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in not sustaining the general and special exceptions of plaintiff in error, because it appeared from the pleadings herein that this action should not have been prosecuted at law, but was only properly cognizable in equity.

III.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in admitting the evidence of James Aydelotte to this effect:

"I know of another fire about sixty feet on the south side of the main track. It occurred in a pile of shavings on the same day, and there were cinders over the work-bench and on the ground where this fire was. This was about 350 feet east of the cotton fire. I saw this and the cotton fire about the same time. Don't know which fire occurred first. There was a train in sight when both fires originated."

Because said evidence was irrelevant to any issue in the case, and because it was not shown, but only presumed, that this fire originated from the train, and to admit this evidence to prove the origin of the fire to the cotton was to found a presumption on a presumption.

IV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in admitting the evidence of Lee Cooper to this effect:

"That when he was about one and one-fourth miles east of Clarksville a freight train passed him about the time he crossed the railroad. That when he was about a quarter of a mile west of where he saw the train he saw the grass burning on the south side, and near the railway track."

Because this evidence was irrelevant to any issue in the case, and further, because the witness did not know

how it originated, bnt there was only a presumption that it originated from the engine, and to permit evidence as to this fire to show the origin of the fire which burned the cotton, or negligence in setting it out, was to found a presumption upon a presumption.

V.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in admitting the evidence of the witness H. A. Green, to the effect that after leaving one fire, he went down the railroad track towards home and saw the grass on fire in two other places ; that they were not extensive, but burned over only small patches, because said evidence was irrelevent, and because the witness stated that he did not know how these fires originated, but knew no way they could have originated except from the train, so that it was a presumption as to how they did originate, and to allow this evidence for the purpose of showing the origin of the cotton fire, and negligence upon the part of the evidence [defendant] in setting it out, was to found a presumtpion upon a presumption.

VI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in admitting the evidence of the witness L. A. Rains, to the effect that, after he had seen one fire set out by the train, the grass was also

seen on fire about 150 yards from his house, and about 40 feet from the track, and that another fire was burning about 300 yards east of his house, and about 600 feet from the track, because said evidence was irrelevant and immaterial, and because, further, the origin of these fires was unknown, and to permit evidence to be given as to them for the purpose of showing that the cotton fire originated from plaintiff-in-error's engine, or that the plaintiff in error negligently set it out, was to found a presumption on a presumption.

VII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in admitting the evidence of Lon Martin, James Aydelotte, Sam Taylor and Andrew Deaver, to the effect that they did not know of any opportunity, and saw no opportunity, for the cotton to have caught fire except from the locomotive drawing plaintiff-in-error's train, because said evidence was irrelevant, and because it was in the nature of conclusion of the witness to the effect that the fire did originate from the engine.

VIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in permitting defendant in error to put to the witness Wells the hypothetical question :

"Suppose an engine should come along, and in the course of four miles and a quarter, set out, say eight fires, should set fire to the grass in some of these places, set fire to shavings 60 feet from the right of way, set cotton on fire and that live cinders could be seen falling, and fell and smoked after falling on the ground, over work-benches and things and over platforms, would you say there was anything wrong about the operation or construction of that engine, or would you say that it was all right, and suppose that instead of eight fires there were five, under the conditions named to you, what would you say?"

And in permitting the answer of the witness:

"An engine that would do as you have stated is doing something unusual, very unusual. If there was dry and combustible material close to the track, a spark from the ash pan might drop among it and set it afire. What you have said might occur, but it would be very unusual. I could not say there would be anything wrong in the operation of the engine, but there might be something deranged about the ash pan, is the only way I can account for it. If the engine did set out sparks in the manner stated by you, I cannot believe the engine was in quite perfect condition."

Because the evidence sought to be elicited was not such as was the subject of expert testimony, but the endeavor was to substitute the conclusion of the witness for that of the jury, and it was not allowable by a hypothetical question such as this, and the answer thereto, to prove that the bad equipment of the engine in the face of actual testimony that the equipment was in good order.

## IX.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in permitting the defendant

in error to read the deposition of the witness B. F. Caperton, because the witness was actually present in Court and tendered the defendant in error in person, and if the defendant in error his testimony it was his duty to place the witness upon the stand.

X.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in charging the jury as follows :

" But if the railroad company failed to use the most approved spark arresters the apparatus connected with the engine, as is in ordinary use by properly conducted railways, to prevent the escape of fire in so far as could consistently be done with the business they are conducting, it would be an act of negligence, and if under the evidence defendant was negligent in this particular, and Mr. Watson was not guilty of contributory negligence in allowing his cotton to be stored where it was and others matters with regard to it, and because of such negligence fire was communicated to the cotton, then you will return a verdict for the plaintiff."

Because under the undisputed evidence plaintiff in error's engine was equipped with the most approved spark arrester, and the charge submitted an issue not made by the evidence.

XI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said

Court committed no error in refusing to give a charge requested by plaintiff in error, to the effect that when Mr. Watson placed his cotton in proximity to the railroad track he assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated, and if the cotton was destroyed because of risks so assumed by him, he could not recover, and in saying that he assume[d] that contributory negligence and assumed risk amounted to the same thing.

And in giving, instead of such charge, the following: "As stated, gentlemen, on the question, either call it assumed risk or contributory negligence, if it was contributory negligence, in placing the cotton where it was placed, and as stated before in determining whether it was contributory negligence or not, you are to apply the rule to what a reasonably prudent man, a man of ordinary prudence would do under like circumstances, whether or not he would place the cotton there, and leave it there in the condition it was left. If you find that a man of ordinary prudence would have done it, then, no matter whether it is called assumed risk or contributory negligence, it would debar plaintiff from recovery," because contributory negligence and assumed risk are not the same thing, and because whether Mr. Watson was guilty of contributory negligence or not, if he placed his cotton in close proximity to the railroad track, he assumed all risk likely to arise from fire set out by engines properly equipped and operated, and plaintiff in error was entitled to have the jury specifically so told.

XII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to admit in evidence the stipulations and exemptions contained in the leases under which O'Neill held possession and occupancy of the platform.

## BRIEF.

### I.

**There was error in admitting evidence of there being fires in other places without proof that they were caused by defendant's engines.**

This question is preserved in the third, fourth, fifth and sixth assignments of error *(ante.*, pp. 4, 5), and by objections made at the trial and overruled by the Court *(Tr.*, pp. 25, 26, 28, 29).

We are not contending that evidence of other fires set out by railway engines is not admissible to show that the fire on account of which the suit is brought was probably so set out and also to show the probable negligence on the part of the owner of the engine in setting out the fire in question. In some jurisdictions it is held that such evidence is not admissible, but the great weight of authority is to the contrary and in the

United States Courts it is held that such evidence is admissible, the rule being established not only by many decisions of the lower courts but by the Supreme Court of the United States. *Grand Trunk Railway vs. Richardson, 91 U. S., 454.* What we are contending for is that when it is claimed that a railway engine set out a fire and another fire is seen near the railway track about the time the engine passes, but the origin of the second fire is not known, it is not, on account of its proximity to the railway, permissible to presume that it originated from the engine and then further presume that the fire out of which the litigation grew must also have originated from the engine or that there was negligence in setting it out.

It is well settled that presumption cannot be based upon presumptions. You can not go on indefinitely presuming a series of effects from a presumed series of causes. When a fact is established all legitmate presumptions may be drawn from it; but when we have to presume a fact, and then desire from this presumption to draw a presumption of another fact we are going too far.

The case of *St. Louis and San Francisco Ry. Co. vs. Jones, 59 Ark., 105*, s. c., *26 S. W. R., 595*, holds that evidence of other fires is inadmissible in the absence of proof that the fires were caused by locomotives of the defendant.

The case of *Musselwhite vs. Receivers, 4 Hughes, 166, 17 Fed. Cas., 1070, Case No. 9972*, is of some help to us. There an engine was seen to pass. Sparks were seen escaping from it, and within five minutes fire was noticed in a building by which it had passed. There was a broken window pane near the railway track where the engine had passed. The Court held that

the evidence was insufficient to show that the fire originated from the engine. He said:

"I think the evidence is inconclusive. It is only circumstantial, and the soundest test of the validity of that sort of evidence is that no theory but the hypothesis upon which the conclusion is based can be formed."

In the case now under consideration Lee Cooper testified that he met the freight train which was alleged by plaintiff to have set out the fire to which this suit relates. When he saw the train he was about a mile and a quarter east of Clarksville. It was running at an ordinary rate of speed and seemed to be operated as trains ordinarily are. He saw no sparks or fire, but noticed an unusually thick smoke escaping from the engine. Over the objection that to admit the evidence was to presume that the fire originated from the engine, and on this presumption found the further presumption that the cotton fire originated from sparks set out by the engine and that the evidence was irrelevant, he was permitted to testify as follows: "When I was about a quarter of a mile west of where I saw the train I saw grass burning on the south side of and near railroad track." The witness stated also that he drove in a trot from the time he saw the train until he came to the second fire. He further stated that he did not know how this fire originated, that he did not see it start, but it was burning at the same time the platform fire was burning (Tr., p. 26). H. A. Green, after having testified to seeing one or two fires set out by the locomotive, over the objection of the defendant, interposed as above shown, was permitted to testify that after leaving this fire he went down the railroad track towards home and saw the grass on fire in two other

places. The fires were not extensive, and burned off small patches of grass from one-eighth to one-half acre in size. He did not see these fires originate, but did not know any way they could have originated except from the train (Tr., p. 28). L. A. Rains testified to seeing a fire originate from a freight train about three and one-half miles east of Clarksville. He then testified that the grass was set on fire about the same time about one hundred and fifty yards west of his house, to which evidence the same objection was interposed as heretofore shown (Tr., p. 29).

Possibly the testimony of Rains which was given by deposition was admissible, for he uses the expression "the grass was also set on fire," and the conclusion might possibly be that he intended to say it was set on fire by the locomotive. The same doubt, however, does not attach to the testimony of Cooper and Green. Each of these, testifying as to certain fires, states distinctly that he does not know how they originated. If, therefore, the evidence is permitted, it must be presumed that it originated from the engine, because this had passed a short time before. The plaintiff insists that this presumption shall be made, and after it is made he insists that it must be further presumed from this presumption that the engine set out the cotton fire, and that there was negligence upon the part of the railway company in permitting it to be set out.

It will not do for the plaintiff to argue that the engine probably set fire in these three places because it was seen to set fire in one or two other places, for this is traveling in a most vicious circle. The very point to be established is that the engine through the negligence of defendant set fire to the cotton. Evidence

that it set out other fires is admissible to show this and because such evidence is admissible the evidence given by Cooper and Green was offered. But when this evidence fails to show with certainty that the engine set out these fires, then from the fact that it was shown to set out other fires you are to presume not only that it set out the cotton fire but also that it set out these three fires, and you are then to reason back to the probability that it therefore set out the cotton fire. Such evidence seems to us inadmissible.

## II.

**The trial Court erred in admitting, against defendant's objection, the evidence of several witnesses to the effect that they "did not know of any opportunity, and saw no opportunity," for plaintiff's cotton to take fire except from defendant's engine.**

At the trial defendant's objection to such testimony was overruled (Tr., pp. 25, 28), and the objection was preserved in the Seventh assignment of error (*ante*, p. 6).

Lon Martin testified: "I do not know of any opportunity for the cotton to have caught fire except from the locomotive" (Tr., p. 25). Aydelote (Tr., p. 25), Taylor (Tr., p. 26), and Deaver (Tr., p. 28), testified to the same effect. When the evidence was offered defendant objected to its introduction, because it was of a negative character and was irrelevant, and in the

nature of a conclusion of the witnesses to the effect that the fire did originate from the engine. These objections were overruled and the evidence admitted (Tr., p. 28).

The action of the Court in admitting this evidence seems to us to have been error. One of the very questions for the jury to determine was whether or not the fire which consumed the cotton originated from the engine. The statement of the witnesses was of an entirely negative character, demanding many collateral inquiries. Furthermore, it was the nature of a conclusion or opinion of the witnesses. They had told about the passing of the engine and the method in which it had passed the cotton, and were then permitted to say that they saw no opportunity, other than this, for the cotton to catch fire. It seems to us that they should have described the circumstances and have left the jury to draw the conclusions.

## III.

**The Court erred in permitting the hypothetical question as to the equipment and operation of the engine to be put to the witness, Wells, and the answer to be returned.**

See the eighth assignment of error and the objection overruled by the trial Court (Tr., pp. 34, 35).

C. N. Wells was placed on the stand by defendant as an expert, and testified that no spark-arrester had

been made which would entirely prevent the escape of sparks. He said:

"A perfect spark-arrester cannot be made and allow the engine to generate sufficient steam to move a reasonable train over a railway."

He further stated that the extension front end spark-arrester, such as was used on the engine which is alleged to have set fire to plaintiff's cotton, was the best spark-arrester. He then testified at length explaining the construction and operation of this system for arresting the escape of sparks and fire (Tr., p. 34. On cross-examination he stated that he had not examined the special engine in question. He was then asked:

"Suppose an engine should come along, and in the course of four and a quarter miles should set out say eight fires, should set fire to the grass in some of these places, set fire to shavings sixty feet from the right of way, set cotton on fire, and that live cinders could be seen falling and did fall and smoked after falling on the ground, over work benches and things, and over platforms, would you say there was anything wrong about the operation or construction of that engine, or would you say it was all right; and suppose, instead of being eight fires, there were five under the conditions named to you, what would you say?"

To this question and the evidence sought to be elicited defendant objected because the evidence was not such as was the subject of expert testimony, but the endeavor was to substitute the conclusion of the witness for that of the jury, and it was not allowable, by a hypothetical question such as this, and the answer thereto, to prove the bad equipment of the engine, in the face of the actual testimony that the equipments were in good order. The objections were overruled and the witness permitted to testify as follows:

"An engine that will do as you have stated is doing something unusual, very unusual. If there was dry

and combustible material close to the track, a spark from the ash pan might drop among it and set fire to it. What you said might have occurred, but it would be very unusual. I couldn't say that there would be anything wrong about the operation of the engine, but there might have been something deranged about the ash pan is the only way I could account for it. If the engine did set out sparks in the manner stated by you I cannot believe that the engine was in quite perfect condition" (Tr., p. 35).

The subject of expert testimony, and when such testimony is admissible, is often a vexatious one. We think we can say, however, that it is never allowable by the introduction of such testimony to substitute the conclusion of the witness for that of the jury. We do not mean to say that an expert witness may not testify at times to things that the jury are to find. What we do mean to say is this: That it is not permissible to allow an expert to give the ultimate conclusion to be drawn from a given state of facts; that is, the final conclusion at which the jury is to arrive from all the evidence.

We can possibly make our meaning clear by an illustration. A rope has broken. The question for the jury to decide is as to whether or not the rope was in good condition for the use to which it was put. An expert could testify as to the resisting power of the textile fabric of which the rope was made. He could testify as to the weight which a rope of this material, of a given dimension, would sustain, if the material was sound. He could testify as to whether or not the rope being dry or wet would have any effect upon its resisting capacity. But if, after he had testified to all these facts, he was asked whether or not the rope in controversy, which had broken under a given strain was in good condition, that being the question at issue, his

testimony would not, we think, be admissible. That is the very question for the jury to decide—the ultimate conclusion to be drawn from all the evidence. With the facts before them, it is for them to say whether the condition was good or bad.

The illustration we have made is suggested by the case of *Hunt vs. Kile, 98 Fed. Rep., 49.* There the question was as to whether or not a certain anchor rope was sufficient. Concerning this the Court use the following language (p. 52):

"It was of course proper for the plaintiff below to prove, if he could, that it was not usual or customary, in such work, to use a manila rope for an anchor rope. It was also competent to show as a fact, that the rope employed was of sufficient strength to sustain the strain to which, in the execution of the work, it would probably be subjected. He had also the right to show, if he could, that the rope was old, defective or worn. But these things must be proven as facts, and they are not difficult to be ascertained. The breaking strength and safe working strength of a manila rope is not a question of speculation or of opinion. These things are determined accurately by tables recognized all over the civilized world, the result of practical tests and of long and extended experience. The jury, if the evidence be conflicting, was the proper tribunal to determine the sufficiency of the rope for the purpose for which it was used, and whether in so supplying that rope the master had failed in the duty which he owed to his servant. The province of the jury in this regard can not properly be invaded by witnesses expressing their opinions upon the very subject which it was the duty of the jury to determine. The witnesses for the plaintiff below were severally asked their opinions upon a hypothetical description of all the appliances, somewhat in this form: 'Whether, in your opinion, that was an ordinarily safe and proper apparatus for the work for which it was used.' This question, in our judgment, was clearly improper. It invaded the province of the jury, and called for the conclusion of the witnesses upon ascertained facts. This was not a question of science, but one upon which, the facts being ascertained, the ordinary and uneducated mind could form an opinion."

In the case of *Crane vs. Columbus Construction Company, 73 Fed. Rep., 984*, the question was whether certain gas pipe that was furnished and laid was of such character and so placed as to stand a certain pressure. Referring to this the Court say (p. 989):

"Upon the question whether the pipe was handled carefully and properly laid, witnesses who supervised or participated in the work were permitted to testify that, in their opinion, the workmen were skillful, and the work well done. It was competent, we think, to show that men of experience and skill were employed upon the work; and doubtless, in such a case, a witness may be required to state what defect, if any, he saw in the work, or what carelessness or lack of skill in the manner of its execution; but the general question whether the line or lines of pipe had been laid with proper skill and care was not one, we think, to be determined upon the opinion of witnesses."

The case of *Electric Equipment Company vs. Blair*, cited *79 Fed. Rep., 896*, was a case for damages on account of injuries inflicted by the negligence of the defendant in hoisting pipes. It was proposed to prove by a witness that in the proper performance of the duty of hoisting a pipe it was necessary that there should be bagging attached to the end of the pipe. The evidence was excluded. In passing upon the propriety of the exclusion the Court say (p. 898):

"It is well understood that the opinions of experts can be given upon questions of science, art, nautical skill, and the class of subjects which require, in order to be understood, special knowledge and study, and in regard to which the jury would therefore be in a state of uncertainty without the aid of those who have been specially instructed *(Transportation Line v. Hope, 95 U. S., 297)*. Especially is this true when the knowledge is attained by reasoning rather than by descriptive facts *(Schwander v. Burge, 46 Hun, 66)*. So that the mere fact that the opinion of an expert may be upon the question which the jury is to decide is not sufficient to exclude the testimony; but there is a very large class of practical questions

upon which a jury is perfectly competent to decide, after having become acquainted with the facts as they existed at the time of the transaction, and in the history of the subject to which the questions relate. For example, the witness could properly state the relative efficiency of different methods of hoisting pipe; but when he was asked to state whether it was necessary, in the proper performance of duty, to attach bagging to the end of the pipes, he was asked the question which the jury could determine upon a statement of simple facts. The province of expert testimony is well stated in Schwander v. Birge, *supra*, as follows: 'The governing rule declared from the cases permitting the opinion of witnesses is that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exist in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject, so as to possess them with a full understanding of it.' So, also, if the facts can not be adequately placed before the jury so as to impress their minds as they impress the mind of a competent, skilled observer, expert opinions are allowed."

In the case at bar, a full description of the engine and its workings were given. The witnesses testified fully as to the facts concerning the fire, and other witnesses testified as to the condition and the operation of the engine. The firemen and engineer testified as to their care in its operation (Tr., pp. 31, 32). A. A. Campbell, who had no connection with the defendant, examined the engine within a few hours after the fire. There has been no repairs upon it. He found all the appliances in good condition, and from his experience with railroad locomotives and his knowledge of the appliances used for the purpose of arresting sparks, he considered the engine safe for the the purpose of arresting sparks (Tr., p. 31). Traver testified to the same effect. He found all appliances in first class condition. They were of the best approved

pattern for the arresting of sparks among persons familiar with the subject (Tr., p. 31). Seegar testified that all the appliances for the arresting of sparks were in perfect condition (Tr., p. 33). Testimony to the same effect was given by W. W. Laing (Tr., p. 33).

In a word, the witnesses testified fully as to what was shown by an actual examination of the appliances for arresting of sparks, and the evidence entirely failed to show that there was anything the matter with them. As stated, their construction was explained to the jury. We think the ultimate conclusion was with them, and it was not permissible by a hypothetical question to place before them the conclusions of the witness Wells.

The impropriety of admitting this evidence is further shown by the testimony of the witness on re-direct examination, wherein he stated that if an engine had set out five fires or eight fires in running a short disance over a track, at a distance of a few feet from the track, he would believe that it was out of condition, but if an actual examination showed its condition to be good and proper, then he would not believe that the engine was in bad condition. The witness added :

" The velocity of the wind and the condition of the atmosphere govern the distance that a fire would be set out from the track. Engines in perfect condition very often set out fires." (Tr., p. 35).

In *Hunt vs. Lowell Gas Light Company, 8 Allen, 169*, the Court say :

" The object of all questions to experts should be to obtain their opinion as to the matter of skill or science which is in controversy and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts."

The evidence of Mr. Wells, especially wherein he expresses the conclusion that he could not say that the engine was in quite perfect condition under the circumstances stated in the hypothetical question, was not merely his opinion as to a matter of skill or science, but was his declaration upon the effect of the evidence.

## IV.

**The Court erred in permitting the plaintiff to read the deposition of the witness Caperton, when the witness was actually in Court and his presence was known to the plaintiff.**

The deposition of B. F. Caperton had been taken by tee defendant. A portion of it was offered by the plaintiff (Tr., p. 37). The witness at the time was in the court and plaintiff knew the fact. A mistake had keen made in the taking of his depositions, and on a former trial of the case he was present and had then testified that there was such mistake (Tr., p. 38). Yet, though plaintiff knew there was a mistake in the deposition, and though the witness had been present on a former trial and testified that the error was made, he was permitted against the defendant's objection and exception to read the deposition.

The practice in the Federal Courts is to always have witnesses present when practicable. This is so true, that notwithstanding the State laws, if a witness lives within the jurisdiction and within one hundred miles of the place where the Court is held, his deposition

cannot be taken. Here the question of the residence of the witness was waived, but it was insisted that when he was in Court, he should have been put on the stand and that the deposition should not be read.

If the Court had the discretion to permit the reading of the deposition, we do not think it was soundly exercised, especially in view of the fact that upon a former trial of the case the witness had explained that there was error in the deposition. This fact was known to plaintiff and known to the Court. The error of the Court was not cured by Caperton's subsequent examination by the defendant.

## V.

**The Court erred in submitting to the jury the issue that if defendant failed to use the most approved spark arresters, and plaintiff was free from contributory negligence, he could recover.**

Tenth Assignment of Error *(ante,* p. 8).

There was not a scintilla of evidence going to show that the most approved spark arresters were not used, on the contrary the entire evidence showed that the spark arresters were of the most approved pattern. As to this there was no question. Van Housen testified of the engine :

> " It was an extension front end engine and had the same kind of spark arrester in general use. * * * When the front end was opened, the netting was the same kind that was in use on all

engines of the T. & P. and was considered the best (Tr., p. 32).

Seeger testified :

> " I examined engine 182 of the T. & P. road with regard to the condition of the appliances for preventing the emission of sparks and with regard to the ash pan. This engine was what is known as an extension front end, and is one of the most approved pattern for the prevention of the escape of sparks and in general use as such on all the leading railroads " (Tr., p. 33).

Campbell testified :

> " Engines with appliances for the arresting of sparks, such as this, are in common use on railways and are approved for arresting sparks. They are used on seventy-five per cent. of railways and are considered the best by people familiar with the operation of railways for the purpose of arresting sparks " (Tr., p. 31).

Wells testified :

> " I have a wide acquaintance with spark arresters and the various patterns used. There is none to my knowledge that has been invented that will entirely prevent the escape of sparks. The extension front end and straight stack, such as is used on the Texas & Pacific is the kind used on three-fourths of the railways in the Union, and is the most nearly a complete spark arrester of any that has been invented " (Tr., p. 34).

All of these witnesses were thoroughly familiar with the subject and competent to testify in reference thereto. To repeat, the evidence did not remotely raise the issue of whether the spark arrester was not of the most approved pattern, yet with it so standing, the Court charged the jury

> " But if the company failed to use the most approved spark arresters and apparatus connected

with the engine as in ordinary use by properly connected railways to prevent the escape of fire, in so far as consistently could be done with the business they are conducting, it would be an act of negligence, and if under the evidence the defendant was negligent in this particular, and Mr. Watson was not guilty of contributory negligence in allowing his cotton to be stored where it was, or in other matters with regard to it, and because of such negligence fire was communicated to the cotton, then you will return a verdict for the plaintiff " (Tr., p. 39).

This is demonstrably erroneous.

We think there is no rule with regard to the charging of the jury better established than this,—that the Court must not submit abstract questions of law not made by the evidence, and must not submit issues not warranted by it. Should it do it, and should there be any reason to believe that such action may have influenced the verdict, then is there error for reversal. In this case, notwithstanding the evidence, and in the face of uncontradicted evidence, the Court left it to the jury to say whether or not the spark arrester was an approved pattern, and told them if it was not they might on this ground return a verdict for the plaintiff, if he was not guilty of contributory negligence. This permitted the jury to disregard the evidence and to go into the field of conjecture, and it is impossible to say that they may not in such conjecture, have concluded that some other pattern of spark arrester should have been adopted. They may have conjectured that there were others which would more effectually prevent the escape of sparks. We do not think that a charge thus bringing an issue into the case not made by the evidence can be held to be other than erroneous.

In the case of *Railway vs. Minnick, 61 Fed. Rep., 635*, and decided by this Court, where it was alleged

that fire escaping from an engine was communicated to a bridge, weakening it and rendering it defective, and where it was charged that the engine was dangerous and defective and out of repair and that the bridge was also defective and out of repair, the Court charged the jury, among other things:

"If the jury believe that the defective and dangerous engine set fire to a bridge on the line of railway of defendant and thereby rendered such bridge unsafe and dangerous and unfit for the purpose for which it was used by defendant, and thereby caused the death of W. W. Minnick," * * *

then in a certain event it would find for plaintiff. The United States Circuit Court of Appeals, reversing the case, say:

"The pleadings alleged generally that the engine complained of was dangerous, defective and out of repair, but there was no proof tending to show any want of repairs in this engine or any defect in it or any element of danger in it other than such as arose from its being constructed with a Brown stack."

Then, after showing that the engineer who was killed knew that the engine was of this construction and assumed the risk of it, the Court held that the above charge was unwarranted by the evidence and reversible error.

## VI.

**The Court erred in refusing to charge the jury that plaintiff in placing his cotton upon the platform assumed the risks which were to be anticipated from engines properly equipped with appliances for prevent the escape of sparks and properly operated, and in saying to them that contributory negligence and assumed risk amount to the same thing.**

The eleventh assignment of error (Tr., p. 55 and *ante*, p. 8) raises this point.

This is a vital point in the case. No one can read the evidence in this case without reaching the conclusion that if there was any negligence on the part of any one it was the negligence of the plaintiff and of O'Neal the bailee of the plaintiff and the owner of the cotton platform in leaving the cotton exposed and unprotected from fire.

The defendant requested the Court to charge the jury that when Mr. Watson placed his cotton in proximity to the railroad track, he assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated, and if the cotton was destroyed because of the risk so assumed he could not recover. The Court declined to give this charge, or any charge on the question of assumed risk other than the following: When this charge was requested he said to counsel that he assumed that contributory negligence and assumed risk were the same thing; that he could state that if Mr. Watson placed his cotton on the platform

without protection or care of it, and that was an act an ordinarily prudent man would not have done and such act contributed to the injury, he could not recover; that further than this he did not appreciate the doctrine of assumed risk, and then said to the jury:

"As stated, gentlemen, on the question, either call it assumed risk, or contributory negligence, if there was contributory negligence in placing the cotton where it was placed, and, as stated before, in determining whether or not there was contributory negligence or not, you are to apply the rule as to what a reasonably prudent man, a man of ordinary prudence, would do under like circumstances, whether or not he would place the cotton there and leave it there in the condition it was left. If you find that a man of ordinary prudence would have done it, then, no matter whether it is called assumed risk or contributory negligence, it would debar plaintiff from recovery" (Tr., p. 40).

There can be no sort of doubt that assumed risk and contributory negligence are altogether different things. It is true they are frequently confused by Courts, and it is equally true that at times such confusion leads to error. In a case such as this they should by no means be confused, but the Court should clearly and distinctly charge on these two phases of the evidence. In declining to tell the jury that plaintiff assumed the risk of fire from engines properly equipped and handled when he placed his cotton where it was, and in further telling the jury that this assumption of risk would not debar him of recovery unless it was contributory negligence, there was affirmative and hurtful error. If the plaintiff placed his cotton where it was placed, and if the engines were properly equipped and handled, then he was debarred of recovery, irrespective of any question of negligence, and the Court upon request of defendant should specifically have so told the jury. The evidence showed that

no spark arrester has been invented which will entirely prevent the escape of sparks and fire. It showed that with the best approved spark arresters, in the best condition, and with the engines properly handled, fire will yet frequently escape from the engine and be communicated to property adjancent to the railway. He who placed his property in proximity to the railway assumed the risk of fire so communicated, although he may have been guilty of no contributory negligence. To say to the jury that he did not assume the risk of fire thus to be communicated unless he was guilty of contributory negligence in placing his cotton where it was, was confusing and misleading.

In the case of *Briant vs. Railway, 104 Mich., 307*, the Court below charged the jury:

"The plaintiff, or his grantees, having erected the mill in close proximity to the railroad track, he must be held to have known of the risks incident thereto, and if there was a special risk, arising from no want of care in the proper equipment and management of the engine in question, then the risk is not chargeable to the railroad but is an incident to the situation, and plaintiff cannot recover."

And yet further charged:

"The plaintiff, having established himself along the line of defendant's right of way and in close proximity to its track where its locomotives would be expected to run, assumed all the risks incident thereto; and if this fire occurred from no want of care in the proper equipment and management of its engines and trains, then such fire is not chargeable to the defendant, and the plaintiff cannot recover."

On appeal the Court approved these charges and said:

"It cannot be said to be negligence *per se* to erect such a building in close proximity to the railroad track, but, as said by the court below, the plaintiff having

erected it there, knowing the circumstances, he must be held to have known the risk incident thereto, and if there was special risk arising from no want of proper equipment of the engine, and the engine was properly managed, the risk would not be chargeable to the defendant, but is an incident to the situation, and the plaintiff cannot recover."

In *Chicago & Alton R. R. vs. Pennell, 94 Ill., 448,* it was said:

"One who builds a hotel near a railway track assumes the hazards connected with the use of the railway, and must use a higher degree of care in providing means to protect his property from fire than a person in a less exposed situation."

See, also, *passim, Hartford Ins. Co. vs. Chicago & A. Ry., 175 U. S., 91, 99.*

Many authorities are to be found in the line of the Briant case, cited above, but we think it needless to encumber this brief with them. There is no doubt that there is a marked difference between assumed risk and contributory negligence, and, as we believe, there can be no doubt that he who places his property near a railway, where engines are constantly passing, assumes all risk of the communication of fire to that property from engines properly equipped and handled. It is held by the great majority of authorities that he who places his property near the railway track does not have to anticipate negligence on the part of the railway and guard against this, but it is held by none, so far as we know, that he does not assume the risk to be anticipated from the communication of fire from engines operated with care and properly provided with appliances for preventing the escape of fire.

## VII.

**The Court erred in refusing to admit in evidence the stipulations and exemptions contained in the lease under which O'Neill held possession and occupancy of the platform.**

See Twelfth Assignment of Error (Tr., p. 55 and *ante*, p. 10).

The platform was largely on the right of way of defendant, and the fire originated on a part of the platform situated on the right of way. This right of way was held by O'Neill by mesne conveyances under leases made by the Texas and Pacific Railway Company, which contained the following stipulation :

"Such lessee does hereby release the Texas & Pacific Railway Company from all liability on account of any loss or damage by fire, whether occasioned by sparks from locomotives or otherwise" (Tr., p. 30).

The leases are shown at length in the record at pages 17, 18. The stipulations in the lease were offered. When they were offered, it was stated that defendant could not prove that Mr. Watson knew of the terms of the lease, but, on the contrary, the evidence would show that he did not know of such terms ; but in connection with the stipulations of the lease as offered, it was offered to be proved that O'Neill held the right of way subject to the terms and stipulations of the lease, and Mr. Watson had stored his cotton on the platform under the control of O'Neill, leaving it there under such control until such time as it might be sold or shipped (Tr., pp. 29, 30). The introduction in evidence of the leases and stipulations above shown was

objected to, because the leases did not purport to release the railway company from any damages except such as the lessee might sustain, it not being contemplated to release the railroad from damages to other parties; because the contract was against public policy, and void in so far as the railroad company undertook to contract against its negligence; and because it did not appear that plaintiff had any notice of the terms of the lease, and this particular stipulation would not be binding upon him in the absence of such notice, he not being a party to the lease; and because, further, the evidence was immaterial, irrelevant and incompetent. The objections were sustained and the lease excluded (Tr., p. 30).

That the lease was valid and binding as between the railway company and O'Neill: that it was not against public policy is plainly shown by the case above cited. The only question is, as to whether or not Mr. Watson would be bound by its terms. The reasoning of the case of the *Hartford Ins. Co. vs. Ry. Co., 175 U. S., 91*, would seem to lead to the conclusion that he would be. The lessee had no right to come upon the right of way of defendant except upon such terms as might be agreed upon between them. The agreement was that if he came there he came at his own risk as to the communication of fire to his property from passing engines. A consideration for the execution of the release was that the defendant railway should be released from damages by fire so communicated. As we have seen, this agreement was valid, binding and not in contravention of public policy. When Mr. Watson placed his property in the hands of O'Neill, O'Neill became his agent, his bailee. He had a special property in the cotton, and if it had been

negligently destroyed by fire by some person other than defendant, he could have sued such person for damages and recovered. He was, so to speak, the special owner of the cotton. He was the person handling, controlling and managing it. He held it for Mr. Watson and left it where it was. He placed it upon the right-of-way of defendant, or, at least upon a platform partially situated upon such right-of-way, and in contiguity with cotton on that right-of-way, where the fire originated. He had the right to place where it was only under the agreement with defendant. When he so placed it there, and when he had stipulated that defendant should be released from damages for the communication of fire from passing engines, the stipulation and agreement was binding not only as to property specifically owned by him, but also, as we submit, as to property in which he had a special ownership and which was placed where it was by virtue of the terms of the lease.

We submit that there was error in the judgment, and we pray that it be reversed and the cause remanded.

Respectfully submitted,

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for the Railway Company.